U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 28 April 2004

BALCA Case No.: 2003-INA-130
ETA Case No.: P2001-CA-09511807/ML

In the Matter of:

LAS PALMAS RESTAURANT,
Employer,

on behalf of

SUNG D. CHANG,
Alien.

Appearance: Gerard Lam, Esquire
Oakland, California
For the Employer and the Alien

Certifying Officer: Martin Rios
San Francisco, California

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for alien labor certification[1] filed by Las Palmas Restaurant ("the Employer") on behalf of Sung Duk Chang ("the Alien"). (AF 16).[2] This decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.
[2] In this decision, AF is an abbreviation for Appeal File.

STATEMENT OF THE CASE

On February 21, 2001, the Employer filed an application for labor certification on behalf of the Alien for the position of "Japanese Food Chef," classified as "Head Cook." (AF 16). The Employer required no advanced education or specialized training, but did require at least three years of prior work experience as a Japanese chef. Job duties included preparation of teriyaki, tempura, sashimi and sushi dishes, menu planning, and supervision of one kitchen employee.

In the Notice of Findings ("NOF"), issued October 10, 2002, the CO informed the Employer that its work experience requirement was unduly restrictive, in violation of 20 C.F.R. § 656.21(b)(2)(i)(A). (AF 11-14). The CO noted that the menu submitted did not justify the requirement of three years experience as a Japanese chef, as the menu included mostly Mexican food and no sushi. In order to correct this deficiency, the CO indicated that the Employer could either amend its application for labor certification by lessening its prior work experience requirement and then readvertising its job opportunity, or attempt to justify its experience requirement as business necessity. (AF 12-13).

In its rebuttal, dated October 10, 2002, the Employer argued that a Japanese chef was needed to properly handle the Japanese dishes on the menu. (AF 6-10). The Employer stated that an American cook would "not know how to properly prepare" the Japanese dishes. (AF 6). Also included with the rebuttal was a copy of a menu, showing sushi, seafood and Mexican dishes. (AF 9-10).

The CO issued the Final Determination ("FD") on December 12, 2002, denying Employer's application for labor certification. (AF 4-5). The CO found that Employer failed to demonstrate the need for a permanent, full-time Japanese chef, given that the menu contained mostly Mexican dishes. Employer failed to rebut the finding that the Japanese chef experience requirement was unduly restrictive. (AF 5).

On January 2, 2003, the Employer filed a Request for Review, arguing that the CO's determination was not supported by evidence. (AF 1-3). The Employer argued that the restaurant served both Mexican food and sushi and that the owner wanted to increase the number of Japanese dishes on the menu. The Employer stated that "there's no Japanese food on the menu because no chef/cook presently knows how to make sushi." (AF 2). The Employer also included a brief profile of the restaurant and a statement about the background of the Alien. (AF 3).

The case was docketed by the Board on March 6, 2003 and the Employer did not file any additional brief in support of its appeal.

DISCUSSION

Twenty C.F.R. § 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. An employer cannot use a requirement that is not normal for the occupation or is not included in the DOT unless it establishes business necessity for the requirement. The purpose of 20 C.F.R. § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Rajwinder Kaur Mann*, 1995-INA-328 (Feb. 6, 1997).

An employer can establish business necessity by showing that (1) the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and (2) the requirement is essential to performing, in a reasonable manner, the job duties as described by the employer. *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(*en banc*). An employer may not impose any more strict requirements than are listed in the DOT classification for the job. *Approach, Inc.*, 1990-INA-230 (Aug. 29, 1995).

The CO has challenged the Employer's requirement of three years of prior work experience as a Japanese chef, finding that requirement to be unduly restrictive. As the CO has pointed out, all the menus submitted by the Employer show that it primarily

serves tacos, burritos, and seafood, along with a small selection of sushi, teriyaki and tempura items. The fact that the Employer serves these items does not establish that it has the need of a full-time, Japanese chef with three years of prior work experience to prepare them. The inclusion of a small number of Japanese dishes on the menu does not negate the fact that the rest of the menu lists mostly Mexican dishes. (AF 9-10). Additionally, although the more recent menu submitted by the Employer does include both sashimi and sushi, the first menu submitted did not include sushi, only tempura.

The DOT indicates, in pertinent part, that a Cook, Specialty, Foreign Food "plans menus and cooks foreign-style dishes, dinners, desserts, and other foods according to recipes." The cook is "usually employed in a restaurant specializing in foreign cuisine." *DOT Code 313.361-030*. The Employer has not established that the position which it is seeking to fill requires the elaborate preparation of foods as set forth in the job description of a Cook, Specialty, Foreign Food. The inclusion of nine Japanese dishes on an otherwise primarily Mexican menu does not establish the need for a specialty chef.

The Employer's assertion that his need for a Japanese chef is because of an increase in the popularity of Japanese food does not establish business necessity. The Employer has not demonstrated that the job requirements of its position bear a reasonable relationship to the occupation in the context of the Employer's business and are essential to perform, in a reasonable manner, the job duties described by the Employer. There is no evidence to support the Employer's assertion that an American chef could not prepare the Japanese dishes on the menu. The Employer did not offer to remove the experience requirement and readvertise the position, as suggested by the CO.[3] The draft advertisement submitted by Employer still included the experience requirement, although it did offer the prevailing wage. As such, labor certification was properly denied.

[3] With the Rebuttal, the Employer submitted a draft advertisement; however, this advertisement addressed another deficiency in the Employer's application, the failure to recruit at the prevailing wage. The draft advertisement still retained the Japanese chef requirement and therefore failed to cure the deficiency.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of the panel by

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of Board decisions; or (2) when the proceeding involves a question of exceptional importance. Petitions for review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400 North
Washington, D.C., 20001-8002.

Copies of the petition must also be accompanied by a written statement setting forth the date and manner of that service. The petition must specify the basis for requesting review by the full Board, with supporting authority, if any, and shall not exceed five double-spaced typed pages. Responses, if any, must be filed within ten days of service of the petition, and shall not exceed five double-spaced typewritten